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No. 08-310

IN THE
Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,
v.

CITY OF VALDEZ, ALASKA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF THE STATES OF ALASKA, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, MARYLAND, MASSACHUSETTS, MONTANA, NEW JERSEY, NORTH CAROLINA, OHIO, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae Alaska, Alabama, Arkansas, Colorado, Delaware, Florida, Idaho, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Ohio, Utah, Washington, West Virginia, and Wyoming ("*Amici* States") are sovereigns that tax the income and property of businesses engaged in interstate commerce. *Amici* States therefore have an interest in addressing the broad arguments made by petitioner Polar Tankers, Inc. and its *amici curiae* regarding (1) permissible formulas for apportioning interstate value among taxing jurisdictions, and (2) the scope of the Tonnage Clause. As relevant here, *Amici* States seek to defend respondent City of Valdez's ad valorem property tax and port-days apportionment method, both of which resemble tax provisions found in tax codes across this nation.

Amici States are not all coastal states able to tax oceangoing vessels, nor do *Amici* States use identical apportionment methods. Yet, regardless of their differences, *Amici* States all share a common understanding of this Court's jurisprudence regarding multi-jurisdiction taxation, as well as considerable practical experience taxing entities engaged in interstate commerce across multiple jurisdictions. *Amici* States urge the Court to apply the clear principles of its jurisprudence and to affirm the judgment of the Alaska Supreme Court.

SUMMARY OF ARGUMENT

I. The port-days method of apportionment the City of Valdez employs, under which oceangoing vessels are taxed according to the number of days spent in Port Valdez in proportion to the number of days spent in all ports, is a fair method of apportionment under the Due Process and Commerce Clauses.

A. This Court has established three fundamental principles of multi-jurisdiction taxation that apply here and confirm the correctness of the decision below. *First*, when property has a tax situs in multiple taxing jurisdictions, each jurisdiction may impose on the property a "fairly apportioned" tax related to the opportunities the jurisdiction provides. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 172-74 (1949). *Second*, because taxing jurisdictions have wide latitude in enacting apportionment formulas, a formula that provides a "rough approximation" of value attributable to a taxing jurisdiction is constitutional on its face. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978). *Third*, a taxpayer's as-applied challenge to an apportionment formula will succeed only upon a showing by "clear and cogent evidence" that the formula has "led to a grossly distorted result." *Id.* at 274 (internal quotation marks omitted).

Polar Tankers ignores those principles and asks this Court to adopt different rules that have no basis in precedent. *First*, Polar Tankers erroneously conflates taxing extraterritorial value, which is prohibited, with taxing the in-state value of property that happens also to move outside the state, which this Court has long permitted. *Second*, it is not the law, as Polar Tankers claims (at 36-37), that the "aim" and "approximate result" of an apportionment

formula must be to tax property's proportionate physical presence within a taxing jurisdiction. Rather, the value attributable to each taxing jurisdiction need only have some connection to the entire panoply of opportunities that jurisdiction provides.

B. Applying this Court's bedrock principles of multi-jurisdiction taxation here, the City's formula is constitutional both on its face and as applied to Polar Tankers.

First, the formula on its face reasonably presumes that the jurisdictions in which property has acquired a tax situs provide all of the opportunities of which the property avails itself, so that those jurisdictions may apportion the full value of the property among themselves. *Second*, apportioning a vessel's value using a port-days formula acknowledges the significant productive values that the ports of embarkation and debarkation supply to the entire voyage. Were it not for those ports, time spent on the high seas would be barren of profit. Moreover, contrary to Polar Tankers' claim, this Court has never invalidated a method of apportionment on its face due to a mere hypothetical possibility of duplicative taxation. Thus, Valdez's port-days formula is constitutional on its face.

Valdez's formula is likewise constitutional as applied to Polar Tankers. Valdez provides the single most important commercial opportunity of which Polar Tankers avails itself — the loading of hundreds of millions of barrels of oil worth billions of dollars. Polar Tankers' vessels are valuable *because* of the opportunities that the City affords, in addition to the services and facilities available to the vessels and their crew while in port. Polar Tankers has failed to produce compelling evidence, as it must, that the

City's valuation and apportionment grossly distort the portion of the vessels' value attributable to the opportunities the City provides.

Polar Tankers' arguments to the contrary misapprehend this Court's apportionment jurisprudence. In fact, the premise of Polar Tankers' argument — that, unlike a calendar-days formula, a port-days formula taxes a vessel for time on the high seas — is counterfactual and contrary to this Court's holding that the Constitution does not compel a particular method of apportionment.

II. The City's ad valorem property tax likewise does not run afoul of the Tonnage Clause. That clause is a narrow provision that prohibits taxes on the privilege of entering port and engaging in commerce. The Tonnage Clause does not preclude levies, like Valdez's, that tax property based on its value. Nor does the Tonnage Clause contain a nondiscrimination principle, as Polar Tankers claims. This Court has never struck down a property tax on the ground that it discriminated against vessels. To the extent this Court has made any suggestion that such a tax must be nondiscriminatory, it has done so only to reinforce the purpose of the Tonnage Clause and prevent discrimination among goods bound for different states, not to prevent discrimination among types of property. In any event, Valdez's property tax is nondiscriminatory.

ARGUMENT

I. THE CITY OF VALDEZ'S PORT-DAYS METHOD OF APPORTIONMENT IS CONSTITUTIONAL

The Due Process and Commerce Clauses limit states' authority to tax out-of-state activities. *See MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1505 (2008). The requirements of the two Clauses are related, *see Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 313 n.7 (1992), and Polar Tankers challenges Valdez's ad valorem property tax under both on the ground that the tax is not fairly apportioned. *See MeadWestvaco*, 128 S. Ct. at 1505 ("[t]he broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state") (internal quotation marks omitted).

A. This Court Has Established Bedrock Principles Of Multi-Jurisdiction Taxation That Confirm The Correctness Of The Alaska Supreme Court's Decision Below

The Alaska Supreme Court's decision accords with three fundamental principles of multi-jurisdiction taxation that are firmly rooted in this Court's Due Process Clause and Commerce Clause jurisprudence and that compel affirmance of the decision below. In seeking reversal, Polar Tankers ignores those principles, which apply to property and other taxes alike, and asks this Court to apply new rules, unmoored to longstanding precedent.

1. *All jurisdictions in which property has obtained a tax situs may assess a fairly apportioned tax on that property*

When property has a tax situs in multiple jurisdictions, each jurisdiction may impose on the property a fairly apportioned tax that reflects the opportunities provided by the jurisdiction. *See Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 323 (1968) ("It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise.").[1]

In the nineteenth and twentieth centuries, this Court eroded and ultimately abandoned the "home port doctrine" — under which vessels were taxable solely by the owner's domicile state — and permitted non-domicile states to impose taxes "fairly apportioned to the commerce carried on within the State." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 172-74 (1949) (permitting non-domicile state to tax vessels that travel "on inland waters" that acquire situs in the state); *see*, *e.g.*, *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18, 26 (1891) (rail cars). Although this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), observed that it "consistently ha[d] distinguished the case of oceangoing vessels," the Court made clear that the theory underlying the "home port doctrine" has "fallen into desuetude" and that the doctrine, "as a

[1] This same rule applies to income and other taxes. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) ("[T]he income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'") (quoting *Norfolk & Western Ry.*, 390 U.S. at 325); *see also MeadWestvaco*, 128 S. Ct. at 1506 (citing cases upholding "taxation by apportionment of net income, dividends, capital gain, and other intangibles").

rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States." *Id.* at 442; *see* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.12[2][c] (3d ed. 2000) (discussing this Court's "complete[]" "reject[ion]" of the home port doctrine).

The rule of fair apportionment recognizes that all jurisdictions in which mobile property has a tax situs provide commercial opportunities to the property and, therefore, are entitled to tax a portion of the property's value to facilitate the provision of those commercial opportunities. *See Ott*, 336 U.S. at 174 (holding that a tax that is "fairly apportioned to the commerce carried on within the State" satisfies the requirement that "the tax in practical operation ha[ve a] relation to opportunities, benefits, or protection conferred or afforded by the taxing State"); *see also supra* note 1.

In other words, a jurisdiction with authority to tax personal property may impose a tax that "bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Moreover, the value a state apportions to itself for tax purposes "may be ascertained by reference to the total system of which the intrastate assets are a part," as well as "a portion of the intangible, or 'going-concern,' value of the enterprise." *Norfolk & Western Ry.*, 390 U.S. at 323-24; *see Pullman Co. v. Richardson*, 261 U.S. 330, 338 (1923) ("[T]he tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the [interstate] system.").

As a "corollary" to the rule of fair apportionment, when property has a tax situs in multiple jurisdic-

tions, "no jurisdiction may tax the instrumentality in full." *Japan Line*, 441 U.S. at 447. In other words, contrary to the "home port doctrine," "the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State." *Central R.R. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 614 (1962); *see Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 601 (1954) (same).

The reason for this corollary rule is straightforward: if property has sufficient contact with a non-domicile jurisdiction to acquire a tax situs there, it cannot be that all of the opportunities afforded to the property are attributable to the domicile state. *See Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952) ("Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."). Accordingly, it makes no difference whether the property "*is* subjected to tax elsewhere" or merely "*could* be," *Central R.R.*, 370 U.S. at 614; each jurisdiction is entitled to tax only that portion of the value that "bears fiscal relation" to the opportunities it affords, *J.C. Penney*, 311 U.S. at 444.

2. *States have substantial latitude in devising apportionment formulas*

"States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders." *Norfolk & Western Ry.*, 390 U.S. at 324; *see Moorman*, 437 U.S. at 274 (same with regard to income taxes). The Constitution does not impose any single method of apportionment. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) ("we have long held that the Constitution

imposes no single [apportionment] formula on the States") (alteration in original; internal quotation marks omitted).

This second fundamental principle recognizes "the practical difficulties involved" in apportioning value among taxing jurisdictions to arrive at "an exact measure of value." *Norfolk & Western Ry.*, 390 U.S. at 327, 329. Accordingly, this Court's decisions "do not require any close correspondence between the result of computations" under a formula "and the value of property actually located in the State." *Id.* at 327. It follows that an apportionment formula is fair — and, therefore, constitutional *on its face* — so long as it provides a "rough approximation" of the value attributable to the opportunities the taxing jurisdiction provides. *Moorman*, 437 U.S. at 273.

3. *The taxpayer bears the burden of proving that a facially valid apportionment formula is unconstitutional as applied*

For a taxpayer to show that a formula that on its face fairly apportions value or income among states is nevertheless unconstitutional *as applied* to the taxpayer, the taxpayer has the heavy burden of showing by "clear and cogent evidence" that the formula has "led to a grossly distorted result" or that the results of the formula are "out of all appropriate proportion to the business transacted." *Moorman*, 437 U.S. at 274 (internal quotation marks omitted); *see Norfolk & Western Ry.*, 390 U.S. at 326 (as-applied challenge must show that the formula "has resulted in . . . gross overreaching, beyond the values represented by the intrastate assets purported to be taxed").

For example, in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Backus*, 154 U.S. 421 (1894)

("*PCC&S Railway*"), this Court upheld the validity of Indiana's "mileage formula" as a basis for apportioning and taxing the value of rail cars. The mileage formula provided that "rolling stock shall be listed and taxed in the several counties . . . in the proportion that the main track used or operated in such county . . . bears to the length of the main track used or operated by such person, company, or corporation." *Id.* at 427 (ellipses in original; internal quotation marks omitted). After establishing that the formula was valid on its face, *see id.* at 427-32, the Court held that it was valid as applied to the railway, even though "the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891," because there was no evidence of wrongdoing by Indiana and no compelling evidence from the taxpayer of a more accurate valuation, *see id.* at 432-37.

By contrast, in *Norfolk & Western Railway*, this Court struck down the use of a mileage formula as applied. The Court first noted that it had, "in various contexts, permitted mileage formulas as a basis for taxation," *see* 390 U.S. at 326 (citing *PCC&S Railway*), and confirmed "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints," *id.* In that case, however, the Court found that Norfolk & Western had "borne [its] burden" of demonstrating that Missouri's mileage formula resulted in "gross overreaching." *Id.* In particular, Norfolk & Western demonstrated that Missouri's formula inexplicably valued property at more than twice its value the preceding year and that the formula "postulat[ed]" that roughly 8 percent of Norfolk & Western's rolling stock was in Missouri, when, in fact, the railway proved that the number

was much closer to 2-3 percent. *Id.* at 326-27. And "the record [wa]s totally barren of any evidence . . . which might offset the devastating effect of the demonstrated discrepancy." *Id.* at 327.

Thus, *PCC&S Railway* demonstrates that an as-applied challenge will fail when the taxpayer relies only on a discrepancy among valuations, whereas *Norfolk & Western Railway* establishes that a taxpayer's as-applied challenge may succeed where the taxpayer presents compelling evidence of the property's value properly attributable to the state, particularly where (as in *Norfolk & Western Railway*) that evidence is unrebutted by the taxing jurisdiction.

4. *Polar Tankers asks this Court to adopt and apply new taxation rules that are contrary to precedent*

Polar Tankers ignores those three, firmly rooted principles of multi-jurisdiction taxation and asks this Court to craft new, unprecedented rules that will handcuff taxing jurisdictions and unreasonably shelter from taxation income and property engaged in interstate commerce.

a. First, Polar Tankers erroneously conflates taxing extraterritorial value, which is prohibited, with taxing the in-state value of property that also moves outside the state, which this Court has long permitted. *See* Pet. Br. 34-39.

It is beyond dispute that a jurisdiction may not tax "extraterritorial value." *See*, *e.g.*, *MeadWestvaco*, 128 S. Ct. at 1502. But it is likewise settled that, once property has acquired a tax situs in a jurisdiction,[2]

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[2] Polar Tankers correctly asserts that "'the power to tax is predicated upon jurisdiction of the property.'" Pet. Br. 33

that jurisdiction may tax the portion of the property's full value that is attributable to opportunities, benefits, and protections the jurisdiction provides, regardless of where else the property may be located at various times throughout the year. *See*, *e.g.*, *Ott*, 336 U.S. at 174-75; *see also Moorman*, 437 U.S. at 272-73.

Thus, an important distinction exists between extraterritorial *value* and extraterritorial *location*. Polar Tankers conflates the two and erroneously concludes that a jurisdiction unconstitutionally taxes extraterritorial value whenever it assigns to itself a proportion of the property's value that is greater than the proportion of time the property spends within that jurisdiction. That contention, however, ignores the principle that a jurisdiction with authority to tax property in interstate commerce may tax all of the "values 'reasonably attributable' to activity within" the taxing jurisdiction without violating the prohibition on taxing "extraterritorial values." *Luckenbach S.S. Co. v. Franchise Tax Bd.*, 33 Cal. Rptr. 544, 550 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964) (per curiam) (dismissing "for want of a substantial federal question").[3] Value attributable to a jurisdiction is not necessarily (or even often)

(quoting *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944)). That is, a non-domicile jurisdiction does not have authority to tax property until the property has sufficient contact with the jurisdiction to acquire a situs there. *See Central R.R.*, 370 U.S. at 614; *Braniff*, 347 U.S. at 599-601. But there is no dispute here that Valdez has authority to tax Polar Tankers' property. *See* Pet. App. 8a.

[3] As Valdez notes (at 35), such a dismissal by this Court is a disposition on the merits that is entitled to precedential weight. *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 150 n.20 (1986); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

directly correlated to the amount of time the property spends in that jurisdiction.

Due process, moreover, requires only a sufficient connection between the taxing jurisdiction and the thing taxed (*i.e.*, situs), and that "'the tax in practical operation ha[ve] relation to opportunities, benefits, or protection conferred or afforded by the taxing State.'" *Braniff*, 347 U.S. at 600-01 (quoting *Ott*, 336 U.S. at 174); *see Moorman*, 437 U.S. at 273 ("rough approximation"). In evaluating a challenge to an income tax much like Polar Tankers' challenge to Valdez's property tax, this Court in *Moorman* affirmed the validity of those "two restrictions on a State's power to tax" and rejected as "foreclosed by prior decisions of this Court" the "claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State." 437 U.S. at 272-73.

b. Second, quoting *Norfolk & Western Railway*, Polar Tankers asserts that "taxation of property not located in the taxing State is constitutionally invalid," 390 U.S. at 325, and argues that "an apportionment formula is valid only if its aim, as well as its approximate result, is to tax property on the basis of its actual proportionate presence within the taxing jurisdiction." Pet. Br. 36-37. However, the cases do not support that claim.

In *Norfolk & Western Railway*, this Court invalidated Missouri's mileage-based apportionment formula as applied to the railway because there was an inexplicable discrepancy between the property's assessed value and its actual value, as established by the taxpayer's evidence, *see* 390 U.S. at 326-28, not because the tax was out of proportion with the prop-

erty's physical presence in Missouri.[4] Moreover, in prohibiting "[t]he taxation of property not located in the taxing State," *id.* at 325, the Court was referring to property that has not acquired a tax situs within the state, as the cases the Court cited make clear. *See Wallace v. Hines*, 253 U.S. 66, 69 (1920) ("allowing a State to look beyond its borders when it taxes the property of foreign corporations . . . [to] get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess"); *Southern Ry. Co. v. Kentucky*, 274 U.S. 76, 83 (1927) (same); *Fargo v. Hart*, 193 U.S. 490, 499 (1904) ("[W]hen . . . property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state.").[5]

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[4] Indeed, the Court acknowledged the possibility that, as in cases like *PCC&S Railway*, there could be some explanation for the discrepancy, such as the property's "organic relation to the [interstate] system" or "going-concern or intangible value." 390 U.S. at 324, 327 (alteration in original; internal quotation marks omitted). However, there was no record evidence supporting such explanations, and the Court therefore invalidated the tax as applied to Norfolk & Western. *See id.* at 327-28.

[5] Polar Tankers also relies on *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), and *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920), *see* Pet. Br. 34-37, but neither case supports Polar Tankers here. In *Union Tank Line*, the Court invalidated Georgia's mileage formula as applied to Union Tank Line because the formula was "appraised according to an arbitrary method," such that the tax assessed bore no relation "to real value," 249 U.S. at 283, not because the tax bore no relation to physical presence. In *Underwood Typewriter*, this Court *upheld* Connecticut's tax on profits of a Delaware corporation headquartered in New York because "[t]he corporation [did] not

For these reasons, this Court should reject the erroneous propositions Polar Tankers asserts, and should instead rely upon the fundamental principles of multi-jurisdiction taxation it has long applied. As the Supreme Court of Alaska recognized, when Valdez's ad valorem property tax is evaluated in light of these three fundamental principles of multi-jurisdiction taxation, its constitutionality cannot be questioned.

B. Port-Days Methods Of Apportionment Permissibly Tax Property In Interstate Commerce Based On The Opportunities Provided By The Taxing Jurisdiction

1. *States across the country employ port-days and similar apportionment formulas*

Consistent with the second fundamental principle of multi-jurisdiction taxation, *see supra* Part I.A.2, numerous states employ port-days and similar apportionment formulas in taxing a portion of property, income, or sales in interstate commerce. For example, both Alaska and Pennsylvania use port-days formulas to determine the portion of income from watercraft engaged in interstate commerce that is attributable to, and subject to corporate income tax in, a taxing jurisdiction. *See* Alaska Stat. § 43.20.071(a); 72 Pa. Stat. Ann. § 7401(3)(2)(d)(1); *see also* Neb. Rev. Stat. § 77-1245 (apportioning value of aircraft based on in-state percentages of take-offs and landings, passengers and cargo, and revenue originated). Other states, including New Jersey and West Virginia, have apportionment formulas that similarly divide the total value of taxable

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even attempt[]" to show that the tax was arbitrary, 254 U.S. at 121, not because the tax bore a sufficient relation to the taxpayer's presence in the state.

sales among taxing jurisdictions, excluding sales made to purchasers in jurisdictions where the taxpayer is not subject to tax. *See* N.J. Rev. Stat. § 54:10A-6; W. Va. Code § 11-24-7(e)(11)(B). And similar laws that do not apportion taxable value to non-taxing jurisdictions have been proposed by the Multistate Tax Commission and adopted by many states.[6]

The Alaska Supreme Court is not alone in affirming the constitutionality of such formulas, as other state courts have upheld income-tax apportionment formulas that include a port-days allocation similar to Valdez's. *See Sea-Land Serv., Inc. v. Comptroller of Treasury*, No. 1620, 1984 WL 2910 (Md. Tax Ct. Dec. 18, 1984) (upholding use of port-days apportionment formula for income tax); *Luckenbach*, 33 Cal. Rptr. at 549 (same); *cf. Pfizer Inc. v. Director, Div. of Taxation*, 24 N.J. Tax 116 (upholding facial validity of N.J. Rev. Stat. § 54:10A-6), *appeal granted*, 960 A.2d 388 (N.J. 2008). *Amici* States are aware of no federal or state court decision striking down a port-days apportionment formula as unconstitutional.

Polar Tankers' *amici*, however, seek not only an unprecedented ruling that would invalidate port-

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[6] *See* Multistate Tax Commission Reg. IV.18(h), Special Rules: Television and Radio Broadcasting § 4(ii)(B)(3) (amended Apr. 25, 1996); Ala. Admin. Code r. 810-27-1-4.18(8); 006-05-006 Ark. Code R. § 2.26-51-718(d); 1 Colo. Code Regs. § 201-3 (Television and Radio Broadcasting Regulations); Haw. Code R. § 18-235-38-06.04; Mont. Admin. R. 42.26.1101-42.26.1103; N.M. Code R. § 3.5.19.18; N.D. Admin. Code 81-03-09-38; *see also* Multistate Tax Commission, Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services §§ 3(i), 3(ii)(I) (approved July 31, 2008); 830 Mass. Code Regs. 63.38.11 (proposed).

days formulas, but also a broad ruling that could call into question numerous other state apportionment formulas. *See* Br. of Council on State Taxation 12-14; Br. of Broadband Tax Institute 7-9 & n.8. In doing so, Polar Tankers and its *amici* essentially argue that the only lawful method of apportioning taxable value is to divide the total value of a piece of property equally over the 365 calendar days in a year. In advancing that erroneous position, they offer no reason for this Court to abandon well-settled precedent and to read into the Constitution a requirement that calendar-days apportionment be used. *Amici* States therefore urge this Court to reject the broad approach Polar Tankers and its *amici* advocate, which encourages additional lawsuits challenging similar apportionment formulas in state courts across the country.

2. *Valdez's port-days apportionment formula is constitutional on its face*

Contrary to the claims of Polar Tankers and its *amici*, a port-days apportionment formula — such as the City of Valdez's — provides, on its face, a rough approximation of the opportunities a taxing jurisdiction affords to a taxed entity and, therefore, is a fair method of apportionment. That is particularly true where, as here, a taxing jurisdiction has provided taxpayers a procedure to present evidence challenging the accuracy of the jurisdiction's rough approximation.

a. To the extent Polar Tankers challenges the constitutionality of Valdez's port-days formula on its face, it "can only succeed . . . by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange*

v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (brackets in original). Polar Tankers has not even *attempted* to show that Valdez's port-days apportionment formula never results in a constitutionally permissible rough approximation of value attributable to Valdez.[7] For that reason alone, this Court should uphold the facial validity of Valdez's port-days apportionment formula.

b. In all events, a port-days method of apportionment provides a permissible "rough approximation" of taxable value that is "rationally related to values connected with the taxing State." *Moorman*, 437 U.S. at 273 (internal quotation marks omitted).

First, as Polar Tankers concedes (at 32-33), if "property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdiction a tax situs," then "it is surely appropriate to presume that the domicile is the only State affording the opportunities, benefits, or protection which due process demands as a prerequisite for taxation." *Central R.R.*, 370 U.S. at 612 (internal quotation marks omitted). In that instance, the "tangible property . . . may be taxed to its full value by the owner's domicile." *Id.*

Likewise, when a taxpayer's property has a tax situs in *multiple* jurisdictions, it is "appropriate to presume" that those jurisdictions *together* afford all

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[7] Indeed, despite all of its *hypothetical* apportionments and the alleged disparity in percentage apportionments, *see* Pet. Br. 28-30, Polar Tankers asserts only that the formula results in a "substantial" "inflationary effect," *id.* at 30. Such an allegation fails to establish that Valdez's formula never results in a permissible rough approximation. It therefore is insufficient to invalidate Valdez's apportionment formula on its face.

of the commercial opportunities, benefits, and protections that the taxpayer's vessels enjoy. *Id.* Thus, the "full value" of the owner's "tangible property" should be apportioned among *all* of the taxing jurisdictions that "afford[] the opportunities, benefits, or protection which due process demands as a prerequisite for taxation." *Id.* (internal quotation marks omitted). The Valdez formula does just that, for it expressly limits the ports used in the denominator to those "where the vessel *has acquired a situs for taxation*." Pet. App. 55a (emphasis added).

Second, apportioning a vessel's value using a port-days formula "acknowledges the productive values supplied to the entire voyage, including the high seas sector, by activities within [each taxing jurisdiction]." *Luckenbach*, 33 Cal. Rptr. at 549 (upholding California's port-days formula for allocating a portion of a taxpayer's net corporate income from interstate operation of oceangoing vessels). A taxing jurisdiction could conceivably use a variety of ways to measure and apportion value, including time, location, and production. *See id.* Although "[e]conomic activity in the transportation industry moves in all three of these dimensions," *id.*,[8] a vessel transporting cargo in interstate commerce on the high seas finds its value predominantly in its cargo, *see id.* ("Were it not for the productive potential acquired at the port of departure and liquidated at the port of destination, the high seas portion of the time-space continuum

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[8] *See* 33 Cal. Rptr. at 549 ("Activity occurring at a particular location and within a particular time span may have been produced by activity at a different place and earlier time; and it might produce no profit at all except for the fact that it will result in further activity at a third location during a third time span.").

would be barren of profit."). Thus, when a taxing jurisdiction uses a port-days formula, it "is taxing not extraterritorial values, but values 'reasonably attributable' to activity within [the jurisdiction]." *Id.* at 550; *see also Norfolk & Western Ry.*, 390 U.S. at 323-24 (holding that the value a state apportions to itself for tax purposes "may be ascertained by reference to the total system of which the intrastate assets are a part," as well as "a portion of the intangible, or 'going-concern,' value of the enterprise").

For both reasons, the Valdez port-days formula is fairly apportioned on its face and comports with the Due Process and Commerce Clauses. Any remaining doubt about the facial validity of the Valdez formula should be erased in light of the City's procedure allowing a taxpayer to petition for use of "another apportionment formula" and to present evidence of "the portion of the total value of the vessel that should be apportioned" to Valdez. Pet. App. 56a. As in *Moorman*, that process ensures resolution of apportionment questions without premature judicial intrusion. *See* 437 U.S. at 275 ("The Iowa statute afforded appellant an opportunity to demonstrate that the single-factor formula produced an arbitrary result in its case. But this record contains no such showing and therefore the Director's assessment is not subject to challenge under the Due Process Clause."); *see also Goldberg*, 488 U.S. at 265 ("[T]he risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision.").

c. Rather than attempt to demonstrate that Valdez's tax is facially invalid because it "is unconstitutional in *all* of its applications," *Washington State Grange*, 128 S. Ct. at 1190 (emphasis added), Polar Tankers argues just the opposite — that the mere

hypothetical possibility of "potentially duplicative taxation . . . require[s] invalidation of the Valdez apportionment formula," Pet. Br. 41. That is not the law.

This Court has never held that the mere hypothetical possibility of duplicative taxation is sufficient to invalidate an apportionment formula on its face. To the contrary, this Court has said that two jurisdictions' taxes may lawfully *overlap*, with each taxing the same portion of value. *See Moorman*, 437 U.S. at 277-78 & n.12 ("[e]ven assuming some overlap" among two jurisdictions' apportionments, if the challenged jurisdiction "treats both local and foreign concerns with an even hand[,] the alleged disparity can only be the consequence of the combined effect of [both jurisdictions'] statutes, and [the challenged jurisdiction] is not responsible" for the disparity); *see also Goldberg*, 488 U.S. at 263-64 ("[A] limited possibility of multiple taxation, however, is not sufficient to invalidate the [state's] statutory scheme"). It follows that Polar Tankers' unsupported claim (at 41) that other jurisdictions are merely "entitled" to levy duplicative property taxes on the vessels necessarily fails to demonstrate that Valdez's tax is unconstitutional.

The only case on which Polar Tankers relies to support its risk-of-duplicative-taxation theory is *Central Railroad*, in which this Court stated that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State." 370 U.S. at 614. However, the "could be" language in *Central Railroad* does not serve to *invalidate* potentially duplicative taxes of non-domicile states, as Polar Tankers supposes, but rather to *limit* the otherwise broad

authority of *domicile* states to tax mobile property and thereby to give domicile and non-domicile states equal taxing authority. *See Braniff*, 347 U.S. at 601 ("'The rule which permits taxation by two or more states on an apportionment basis *precludes* taxation of all of the property by the state of domicile.'") (quoting *Standard Oil*, 342 U.S. at 384) (emphasis added); *supra* pp. 6-8.

In all events, Polar Tankers presents no evidence of actual duplicative taxation. To the contrary, before the Valdez City Council, "Mr. Leon Vance, counsel for the protesting shippers, conceded that none of these vessels were in fact taxed by any other taxing jurisdiction." JA 52. Polar Tankers makes no contrary representation to this Court.[9] Thus, Polar Tankers' argument regarding the so-called risk of duplicative taxation has no basis in fact or law, and this Court has no reason to validate it.[10]

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[9] Even if Polar Tankers could show some actual evidence of duplicative taxation, which it has not even attempted to do, the proper course would be to present that evidence to Valdez in the first instance, not to this Court. *See* Pet. App. 56a. Although Polar Tankers states that it has petitioned the City to apply a different apportionment formula to its vessels, *see* Pet. Br. 6, Polar Tankers did not provide the City with any evidence of duplicative taxation when it did so, *see* JA 21-45; *Moorman*, 437 U.S. at 275 (rejecting taxpayer's challenge because state statute "afforded appellant an opportunity to demonstrate that the [apportionment] formula produced an arbitrary result in its case," but "this record contains no such showing").

[10] Polar Tankers also claims that Valdez's apportionment formula creates an unconstitutional risk of duplicative taxation because it "excludes from the denominator of its apportionment formula days when vessels are in another port but undergoing repairs or idled by a strike." Pet. Br. 48. However, such days are likewise excluded from the formula's numerator, which means that Valdez denies *itself* the ability to increase its appor-

3. *Valdez's port-days apportionment formula is constitutional as applied to Polar Tankers*

Because Polar Tankers concedes that Valdez is a proper taxing situs for Polar Tankers' vessels, *see* Pet. App. 11a, Valdez is entitled to impose a fairly apportioned property tax on the value of Polar Tankers' vessels. *See Ott*, 336 U.S. at 174. The question here is whether Valdez's tax is, in fact, fairly apportioned as applied to Polar Tankers. It is. Polar Tankers has not carried its heavy burden of demonstrating by "clear and cogent evidence" that Valdez's port-days formula leads to a "grossly distorted result" as applied to the facts of this case. *Moorman*, 437 U.S. at 274 (internal quotation marks omitted); *Norfolk & Western Ry.*, 390 U.S. at 326.

a. The City provides numerous opportunities and benefits to Polar Tankers and its vessels. *See generally* Resp. Br. 5-8. Most importantly, *hundreds of millions* of barrels of crude oil worth *billions of dollars* are loaded onto vessels each year at Port Valdez and then transported to various West Coast refineries. *See* Cert. Opp. 1, 7. The significance of that opportunity, which Valdez provides as the northernmost ice-free port in North America, *see* JA 74, cannot be overstated. That oil is why Polar Tankers built its oil tankers, sends those tankers to Valdez, and values its tankers at hundreds of millions of dollars. *See* Cert. Opp. 7.

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tionment of the value taxed based on days that ships lie in Port Valdez during repairs or a labor strike. *See* Pet. App. 55a. By excluding such days from both the numerator and the denominator of its apportionment formula, Valdez maintains a sufficiently accurate "rough approximation" to pass constitutional muster.

Beyond the massive commercial opportunity that the ability to load oil in Valdez represents, Valdez provides countless benefits, protections, and services to Polar Tankers' vessels and their crews while the vessels are in Port Valdez, including the use of public facilities, docking services and facilities, and provision of port security and emergency response measures, among many others, all of which facilitate Polar Tankers' profitable commercial activities. *See* JA 74-77.

b. In contrast to its arguments regarding *hypothetical* malapportionment, Polar Tankers devotes scant attention to the "record evidence" in claiming that Valdez's port-days formula has, "in fact," produced "clearly excessive" tax assessments. *See* Pet. Br. 40-41. The "record evidence" Polar Tankers cites is nothing but a series of percentage calculations for the years 1999-2002 comparing assessments using the port-days formula and a calendar-days formula. That numbers game is beside the point, for the entire exercise rests on Polar Tankers' erroneous premise that a calendar-days method of apportionment is the only lawful method of apportioning its vessels' values among taxing jurisdictions.

Polar Tankers proffers no factual basis for its assumption that the only proper way to apportion a tax fairly is to divide the value of property equally over 365 days and then to assign values to jurisdictions based on the number of days the property is located in each jurisdiction. Yet the entire basis for Polar Tankers' claim of malapportionment is that the port-days method results in a different apportionment than the calendar-days method. Polar Tankers offers no independent measurement of the vessels' commercial opportunities actually attributable to Valdez, nor

does it explain why it believes the value attributable to Valdez is limited to the number of calendar days spent in Valdez.

In fact, a calendar-days method of apportionment is not necessarily more accurate than a port-days method. All portions of a voyage are not equal in value, as a calendar-days method assumes. *See Wallace*, 253 U.S. at 69 (finding "plain" the "injustice of assuming the value" of railroads "to be evenly distributed according to main track mileage," when "the great and very valuable terminals of the roads are in other States"). As explained above, a port-days formula determines a ship's taxable value based on opportunities and benefits attributable to the jurisdictions in which the ship takes port and that *make the property valuable in the first place. See Luckenbach*, 33 Cal. Rptr. at 549. In contrast, Polar Tankers' calendar-days method of apportionment depends entirely on where a ship is located each day of the year and ignores the commercial and productive opportunities that taxing jurisdictions provide. Because Polar Tankers' argument rests on an erroneous factual predicate, the constitutional challenge must fail.

In any event, because this Court has never required an apportionment formula to "result[] in an exact measure of value," *Norfolk & Western Ry.*, 390 U.S. at 329, a mere difference between two methods of apportionment — like that on which Polar Tankers relies — does not establish that either is unconstitutional, *see*, *e.g.*, *PCC&S Ry.*, 154 U.S. at 432-37 (upholding mileage-based formula even though "the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891"). Unlike *Norfolk & Western Railway*, *see* 390 U.S. at 326-28, this is not a case in

which the taxpayer, Polar Tankers, has presented compelling evidence that the results of the formula are grossly distorted, while the City lacks evidence supporting its assessment. On the contrary, it is Valdez that has presented substantial evidence supporting its tax and Polar Tankers that has failed to proffer evidence of gross distortion.

C. Before This Court, Polar Tankers Has Significantly Expanded The Scope Of Its Challenge

In broadening its constitutional challenge in this Court, Polar Tankers proffers arguments not fully developed, briefed, or addressed by the court below, thereby depriving this Court of the Alaska Supreme Court's full consideration of those contentions. Polar Tankers did not emphasize, as it does so prominently here, its assertion that a port-days formula unconstitutionally taxes "extraterritorial value." Pet. Br. 30-40. Rather, Polar Tankers' primary argument was that Valdez's tax "impinges on the domicile's taxing authority, creating the risk of multiple taxation." Pet. App. 11a; *see also id.* at 12a n.25 (addressing "Polar's claim of home port superiority"). If accepted by this Court, Polar Tankers' sweeping propositions about taxation and extraterritorial value could have significant repercussions for many states' tax regimes. *See MeadWestvaco*, 128 S. Ct. at 1508-09 (declining to address an issue "neither raised nor passed upon in the state courts," particularly where the issue threatened two states' taxes and "neither was on notice that the constitutionality of its tax scheme was at issue").

II. VALDEZ'S AD VALOREM PROPERTY TAX IS NOT A DUTY OF TONNAGE

A. The Tonnage Clause Is Narrow In Scope And Does Not Preclude Property Taxes On Vessels

The Framers of the Constitution sought to "alleviate . . . concerns" about interstate discord arising under the Articles of Confederation and to preserve "harmony among the States" by prohibiting "seaboard States, with their crucial ports of entry, . . . from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976). While the Import-Export Clause protects goods themselves from improper taxation by "seaboard States," the Tonnage Clause protects vessels against improper taxation by ensuring that a tax or fee imposed on a ship has some rational basis apart from the mere privilege of using the taxing jurisdiction's ports.

This Court's longstanding Tonnage Clause jurisprudence distinguishes among the types of taxes that may and may not be imposed on vessels. The Clause prohibits duties imposed on ships merely as instruments of commerce. *See*, *e.g.*, *Huse v. Glover*, 119 U.S. 543, 549-50 (1886) ("A duty of tonnage within the meaning of the constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels."); *see also Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265 (1935); *State Tonnage Tax Cases*,

79 U.S. (12 Wall.) 204, 213 (1870). By contrast, taxes or fees imposed on ships are *not* duties of tonnage when those tax revenues are rationally based on "services rendered to and enjoyed by the vessel," such as pilotage, wharfage, or "charges for the use of locks on a navigable river." *Clyde Mallory*, 296 U.S. at 265-66 (citing cases).[11] Likewise, a tax based on a ship's value is not a duty of tonnage. *See*, *e.g.*, *Transportation Co. v. Wheeling*, 99 U.S. 273, 279 (1878) ("[I]t is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.").

Ad valorem property taxes are not duties of tonnage precisely because the tax is based on the prop-

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[11] Consistent with the types of charges discussed in *Clyde Mallory*, some taxing authorities impose a per voyage excise tax on passengers aboard commercial passenger vessels. *See*, *e.g.*, Alaska Stat. § 43.52.210; CBJ Code § 69.20.020 (Juneau); *see also* 26 U.S.C. § 4471 (federal per-passenger excise tax imposed on "person providing the covered voyage"). Not even the Cruise Lines International Association, which filed a brief in support of Polar Tankers, has challenged such taxes as duties of tonnage. And rightly so, for such taxes typically provide a rough approximation of the per-passenger costs for state and local communities to host these commercial passengers, and jurisdictions typically use the funds to provide services and facilities to those passengers. *See*, *e.g.*, Alaska Stat. § 43.52.230 (requiring funds to be used "to provide services and infrastructure directly related to passenger vessel or watercraft visits," "to improve port and harbor facilities and other services to properly provide for vessel or watercraft visits[,] and to enhance the safety and efficiency of interstate and foreign commerce"); CBJ Code § 69.20.120(a) (Juneau) ("[t]he proceeds of the fund shall be appropriated to address the impacts caused by the marine passenger ship industry").

erty's value, not the privilege of using the taxing jurisdiction's port to engage in commerce. *See State Tonnage Tax Cases*, 79 U.S. at 213 ("Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property*, *based on a valuation of the same* as property, are not within the prohibition of the Constitution."). Thus, in the *State Tonnage Tax Cases*, this Court struck down an Alabama tax levied on steamboats "wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents." *Id.* at 217. The Court made clear that the tax would have been permissible if it *had* been based on their value as property. *See id.* at 220; *see also Wheeling*, 99 U.S. at 279 ("[T]here are many cases in which the courts, in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property.").[12]

The Valdez tax that Polar Tankers challenges here, therefore, is an ad valorem property tax. Valdez assesses all taxable property, including vessels, at its "true and full value." Valdez Mun. Code § 3.12.070(A). Valdez's tax code further mandates that "all assessments . . . be uniform and equal and based upon the actual value of the property assessed." *Id.* Polar Tankers does not contest the accuracy of Valdez's assessment of Polar Tankers' vessels. Because Valdez's tax on the vessels is "based on a valuation of

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[12] Because a property tax must be based on the value of the property to be outside the scope of the Tonnage Clause, as an ad valorem property tax is, Polar Tankers' claim (at 17) that a taxing jurisdiction could impose a duty of tonnage "simply by tweaking the label applied to the charge" and calling it a "property tax" is contrived.

the same as property," it is not a duty of tonnage. *Wheeling*, 99 U.S. at 279.

Moreover, Valdez imposes its tax only on those vessels that have "a tax situs within the city," not merely on those that enter Port Valdez. Pet. App. 45a. Under the Due Process Clause, a vessel obtains a tax situs only after having "regular contact" or "'habitual employment of the property within the state.'" *Braniff*, 347 U.S. at 601 (quoting *Johnson Oil Ref. Co. v. Okalahoma ex rel. Mitchell*, 290 U.S. 158, 162 (1933)). Thus, Valdez's tax is *not* a "charge upon a vessel . . . for entering or leaving" Port Valdez, or for "navigating the public waters" of Valdez, *Huse*, 119 U.S. at 549-50, for a vessel may come and go in Port Valdez free from the tax until the ship establishes sufficient contacts to acquire a situs there, s*ee Quill*, 504 U.S. at 306 ("[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'") (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

B. Polar Tankers Misapprehends What Constitutes A Duty Of Tonnage

Polar Tankers erroneously contends that an ad valorem property tax must be "nondiscriminatory" to fall outside the scope of the Tonnage Clause and further claims that Valdez's tax is discriminatory because it "falls almost exclusively on oil tankers." Pet. Br. 3, 17. First, this Court has never suggested, much less held, that the Tonnage Clause includes a nondiscrimination principle. Second, Valdez's property tax does not fall only on oil tankers.

1. Polar Tankers cites no case in which this Court has struck down under the Tonnage Clause an ad valorem property tax on the ground that it

discriminated among types of property. Nor would such a rule be consistent with the Tonnage Clause. So long as a tax is based on the value of property, it makes no difference what *kind* of property is subject to the tax — the tax is *not* a levy "upon the privilege of access . . . to the ports" of the taxing jurisdiction, *Clyde Mallory*, 296 U.S. at 265, and it does not become such a levy simply because it applies only to vessels.

In claiming support for its contention that the Tonnage Clause prohibits a property tax that "discriminates" based on the type of property subject to the tax, Polar Tankers misconstrues inapposite dicta from this Court's cases. In *Wheeling*, for example, this Court upheld a tax imposed on property, including steamboats. Because the tax applied to different types of property, this Court did not have reason or opportunity to opine about the constitutionality of a property tax imposed only on ships. In any event, although the Court referred to taxing ships "in the same manner" as other property, 99 U.S. at 284, its reference to the "manner" of permissible taxation under the Tonnage Clause meant taxation based on *value*, *see id.* at 279 (permitting taxation of a ship "as property, based on a valuation of the same as property"); *see also id.* at 282 ("upon a valuation"), 284 (same).[13]

Polar Tankers also misapprehends *Michelin Tire*, an Import-Export Clause case on which Polar Tank-

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[13] Polar Tankers also relies on a single sentence in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), in which this Court concluded that a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens." *Id.* at 402. In context, the most natural reading of that sentence is that a state may tax a vessel "[just as it may tax] other property owned by its citizens." *Id.*

ers relies heavily (at 19-21). Although the Court refers throughout that decision to "nondiscriminatory ad valorem property taxes," the Court explained what kind of discrimination it had in mind: discrimination between "imported goods" and "domestic goods," 423 U.S. at 288 & n.7, not, as Polar Tankers contends, discrimination between vessels and other types of property. *See also id.* at 289-90 ("An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to *single out goods destined for other States*.") (emphasis added).[14]

This Court has never read into the Tonnage Clause a nondiscrimination principle and has never struck down an ad valorem property tax as unduly discriminatory. The Court's references to "nondiscriminatory ad valorem property taxes" and taxing vessels "in the same manner as other property" simply reinforce what the Tonnage Clause accomplishes directly — a prohibition on taxes that take advantage of the taxing state's coastal position to the detriment of non-coastal states, by imposing a duty on vessels with cargo bound for inland states. An ad valorem property tax, even if imposed only on vessels, does not fall within that category.

2. In all events, Valdez's property tax is nondiscriminatory. The City's tax treats property the same, regardless of where it is from, where it is

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[14] Likewise, when this Court referred to "the prohibition on discrimination" in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 761 (1978), it made clear that it was referring to discrimination "against interstate commerce," *id.* at 750, not discrimination among types of property.

destined, and where the goods are bought, sold, or used. Moreover, the City's property tax does not fall only on oil tankers. *See* Resp. Br. 23-25. As the Alaska Supreme Court properly found, *see* Pet. App. 20a, Valdez taxes such vessels in the same manner as other property, *see id.* at 47a ("[R]eal property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.").

CONCLUSION

The judgment of the Supreme Court of Alaska should be affirmed.

Respectfully submitted,

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